

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

WACKENHUT CORPORATION

Employer

and

Case 4-RC-20676

UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 18

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

AmerGen Energy Co. operates a nuclear power plant, the Oyster Creek Nuclear Generating Station, in Forked River, New Jersey. Since July 2000, the Employer, Wackenhut Corporation, has contracted with AmerGen to provide security services at Oyster Creek. The Employer's Oyster Creek workforce currently consists of Project Manager Gary Shannon, Operations Supervisor Glen Fahring, Training Supervisor Robert Mills, three office employees, four Team Leaders, 21 Supervisors and about 60 Security Officers. The Security Officers are represented by a union other than Petitioner. The parties agree that Shannon, Fahring, Mills and the Team Leaders are supervisors within the meaning of the Act. They also agree that it would be inappropriate to include the office employees in the same unit with the Supervisors. They disagree over whether a unit of the Employer's Supervisors is appropriate.

Petitioner, United Government Security Officers of America, Local 18, seeks to represent a unit consisting of the Employer's Supervisors. The Employer takes the position that the petition should be dismissed because the Supervisors are either statutory supervisors within the meaning of Section 2(11) of the Act or confidential employees.¹ Assuming these arguments are rejected, the Employer contends that Power Shift Supervisor Howard Neuhaus should be included in the unit. The Petitioner asserts that the Supervisors are not statutory supervisors. Its position regarding the inclusion of Neuhaus is unclear.

Field Examiner Devin Grosh held a hearing on July 24 and 25, 2003, at which the parties presented evidence concerning the issues presented by this case. Both parties filed briefs with

¹ Although the Employer stated at the hearing that it was not arguing the Supervisors were confidentials, its post-hearing Brief asserts a contrary position.

me subsequent to the hearing.² I have considered the evidence and the arguments presented by the parties and, as discussed below, I have concluded that the Supervisors are neither supervisors within the meaning of Section 2(11) of the Act nor confidential employees. I also find that Neuhaus should be included in the unit since his assignment as Power Shift Supervisor is temporary, and he is expected to return to a regular Supervisor position in the near future. Accordingly, I have directed an election in a unit of all Supervisors employed by the Employer at the Oyster Creek Nuclear Generating Station.

To provide a context for my discussion concerning the issues, I will first present a brief overview of the Employer's operations. Then, I will review the criteria that must be evaluated in determining supervisory status and apply those criteria to the facts of this case. The Decision will conclude with a consideration of the Employer's claim that the Supervisors are confidential employees and a discussion of Neuhaus' status.

I. OVERVIEW OF OPERATIONS

The Employer's Oyster Creek workforce is organized into four teams – Teams A, B, C and D. Each team consists of a Team Leader, five Supervisors and approximately 15 Security Officers. Security coverage is provided 24 hours a day, seven days a week. Employees work twelve hour shifts, running from either 7:00 a.m. to 7:00 p.m., or 7:00 p.m. to 7:00 a.m. One team is assigned to each shift. The Team Leader has overall responsibility for operations during the course of the shift.

Team members arrive to the facility fifteen minutes prior to the beginning of their shifts for a briefing and are then assigned to "posts" located at various points throughout the Oyster Creek facility. The Team Leader spends most of his time at a Shift Commander Post which is located in an office on the premises, although he does tour the facility twice a shift to check on the Supervisors and Security Officers. Supervisors are assigned to one of five posts and normally remain at the same post for the entire shift. Security Officers, except for those assigned to a Response Team, rotate posts during a shift. Although Supervisors usually work at just one post during a shift, the posting schedule changes on a daily basis and Supervisors have an opportunity to work all five posts.

² After close of the hearing and submission of briefs, the Petitioner filed, and the Employer opposed, a request to reopen the record and to receive into evidence "Position Postings" for two newly created positions. The Petitioner asserts that the Employer has announced the creation of two new positions that will be filled by employees currently employed within the petitioned-for unit; the new job descriptions were created to ensure that some of the petitioned-for employees are excluded from the unit; and that the new positions tend to reinforce the Petitioner's position that the petitioned-for employees are not statutory supervisors. The Employer argues that Petitioner's request fails to meet the "extraordinary circumstances" requirement of Section 102.65(e)(1) of the Board's Rules and Regulations for reopening the record; that the duties of supervisors were thoroughly explored at the hearing and the "new evidence" would add nothing to the record as to the duties of the Supervisors; and that Petitioner's assertion that the documents sought to be placed in the record supports their position that the Supervisors are statutory supervisors lacks merit. The additional evidence, even if adduced, does not add anything more to the record about the functions and duties of the Supervisors sought herein. Accordingly, the request to reopen the record and to receive the documents into evidence is denied.

The five Supervisor posts are Assistant Shift Commander, Central Alarm Station Operator; Main Gate Desk, Owner Controlled Area-1, and the R1 Response Team. The Supervisor serving as **Assistant Shift Commander** (“ASC”), assists the Shift Commander, usually the Team Leader, with managing the day-to-day activities of the security force. Like the Team Leader, the ASC spends most of his time in the Employer’s office at the Oyster Creek facility. The ASC takes over for the Team Leader when the Team Leader is out of the office touring the facility or for some other reason. When the ASC replaces the Team Leader as Shift Commander, he or she has all of the powers and responsibilities enjoyed by the Team Leader. The record does not indicate how much of a normal shift the ASC spends as Shift Commander.

The **Central Alarm System (“CAS”) Operator** is responsible for monitoring alarms and the equipment related thereto, and directing the response to any alarms or malfunctioning equipment. The CAS Operator monitors equipment using closed circuit television and is located in an area separated from the rest of the Employer’s workforce. No Security Officers are normally assigned to work with the CAS, but the CAS can direct a Security Officer to respond to an alarm or to manually perform the security functions usually performed by a piece of malfunctioning equipment.

The **Main Gate Desk** is located at the primary entrance to the Oyster Creek facility. Security Officers assigned to this location are responsible for searching individuals and vehicles entering the premises and issuing security badges. The Main Gate Desk Supervisor monitors the work of the Officers assigned to the Desk.

Officers assigned to the **Owner Controlled Area-1 (“OCA-1”)** are responsible for security in particular areas of the Oyster Creek facility which they patrol using vehicles. The OCA-1 Supervisor ensures that the Security Officers rotate their posts and supervises any vehicle searches which the Officers are required to perform in the course of their patrols.

The **R1 Response Team (“Response Team”)** is located inside what is referred to as the “protected area” of the facility. The Response Team, led by the Response Team Supervisor, has the responsibility for responding to any security “events” that might occur, much like a “SWAT” team. When not responding to events, Response Team Security Officers are assigned to routine patrols. The Response Team Supervisor monitors the Officers on patrol and takes charge in case of an “event”. Security Officers have designated areas to which they are assigned to report at the start of an “event”, but the Response Team Supervisor may reassign them as the “event” proceeds.

Team Leaders and Supervisors ensure that all members of their teams are in compliance with Federal Regulations, AmerGen procedures and directives, the Employer’s Policy and Procedure Manual, and additional Employer directives which are located at each of the posts.

Security Officers are paid hourly at a rate based on the number of years they have been employed by the Employer. The highest paid Officer earns \$17.83 per hour. Supervisors earn \$19.53 per hour and Team Leaders earn \$22.02 per hour. Team Leaders, Supervisors, and Security Officers receive quarterly incentive bonuses based on objective criteria such as the team’s attendance record, tardiness, disciplinary actions, managed overtime, regulatory

compliance, damaged equipment, and requalification training. The incentive bonus, if awarded, is given to all of the members of a particular team. The awards are a percentage of the employee's wage rate. Security Officers receive a maximum of \$1,000 per year as an incentive bonus, Supervisors receive a maximum of \$1,500, and Team Leaders receive a maximum of \$2,000.

Project Manager Shannon holds quarterly meetings with Team Leaders and Supervisors. At the meetings, the Team Leaders and Supervisors give Shannon feedback on Company policy and procedure. The meetings are also used to for training purposes. Security Officers are not present for these meetings.

Supervisors do not perform Security Officers' duties unless there is a manpower shortage. And in the event of a manpower shortage, Supervisors fill in as Security Officers only on an overtime basis. Similarly, Security Officers do not fill in for Supervisors and are not assigned to perform Supervisor functions. Supervisors and Security Officers wear identical uniforms on the job.

II. Supervisory Status

A. The Applicable Legal Standards

"Supervisors" are specifically excluded from coverage under the National Labor Relations Act. Section 2(11) of the Act defines a "supervisor" as an individual who acts in the interest of an employer and exercises independent judgment in performing any one of twelve designated functions. A finding of supervisory status is warranted only where the individual in question possesses one or more of the twelve indicia set forth in Section 2(11). *The Door*, 297 NLRB 601 (1990). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise "independent judgment" in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions; between effective recommendations and forceful suggestions; and between the appearance of supervision and supervision in fact.

The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Id.*; *Juniper Industries*, supra, 311 NLRB at 110. Additionally, the sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), enfd. 961 F.2d 1578 (6th Cir. 1992). Job descriptions or job titles suggesting the presence of supervisory authority are not given controlling weight. Rather, the Board insists on evidence supporting a finding of actual as opposed to mere paper authority. *East Village Nursing and Rehabilitation Center v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999); *Food Store Employees Local 347 v. NLRB*, 422 F.2d 685 (D.C. Cir. 1969); *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976). Evidence of secondary indicia of

supervisory authority, such as attendance at management meetings, is not sufficient to establish supervisory status absent proof that the individual possesses one of the primary indicia of supervisory power set forth in Section 2(11). *First Western Building Services*, 309 NLRB 591, 603 (1992).

The Board has an obligation not to construe the statutory language too broadly because an individual found to be a supervisor is denied the protection of the Act. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Fleming Companies, Inc.*, 330 NLRB 237 fn. 1 (1999); *Bennett Industries*, 313 NLRB 1363 (1994). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

The Employer in this case contends that its Supervisors possess seven of the twelve supervisory powers set out in Section 2(11). According to the Employer, the Supervisors exercise independent judgment in hiring, promoting, disciplining, rewarding, directing, assigning work to and adjusting the grievances of Security Officers. The Employer also contends that its Supervisors regularly substitute for Team Leaders who are admitted supervisors and should be regarded as statutory supervisors on that basis. I consider each of the Employer's claims below.

B. HIRING

The Employer uses two person "hiring boards" to interview and evaluate candidates for employment. The "boards" normally include a Team Leader and either the Project Manager, the Training Supervisor and/or the Operations Supervisor. Each member of a "board" gives an applicant a numerical score, and the scores are averaged to determine the applicant's overall score. Board members then discuss the applicants and make a decision who to hire based on a combination of the numerical scores and their discussion.

Since July 2000, the Employer has used hiring boards to interview approximately 150 individuals for Security Officer positions. Two weeks prior to the hearing, Supervisor Harold Neuhaus participated in the hiring process for the first time. Project Manager Shannon testified that he "believed" former supervisors Juan Miranda and Randy Shaffer may have also have served on hiring boards.³ There is no other evidence of Supervisors interviewing applicants, and the record does not indicate how many applicants may have been interviewed by Neuhaus, Miranda and Shaffer.

The only other instance of Supervisors participating in the hiring process took place in 2000, shortly after the Employer began operations at Oyster Creek. The plant experienced an outage, which required the Employer to hire 15 Security Officers on a temporary basis. Project Manager Shannon interviewed applicants for these temporary positions and decided who to

³ Neither Miranda nor Shaffer is currently employed by the Employer. It is undisputed that both men served as Supervisors while working at Oyster Creek.

employment. But, when the outage concluded, Shannon decided to hire 10 of the 15 temporary Officers on a permanent basis and asked the Supervisors to evaluate the temporary workers and indicate whether they should be converted to permanent status. According to Shannon, he followed the Supervisors' recommendations. There have apparently been subsequent occasions on which temporary Officers were considered for permanent spots, but Shannon consulted his Team Leaders rather than the Supervisors before deciding who to hire in those instances.

C. Work Assignment and Direction

The Project Manager and Operations Supervisor determine the Security Officers' team and shift assignments. Team Leaders are responsible for assigning Officers to work particular posts during the course of their shifts although they have on occasion delegated this responsibility to Supervisors on their teams. The record does not indicate what criteria the Supervisors use in deciding which posts employees should be assigned to work.

Supervisors can alter post assignments during the course of a shift under certain circumstances. If security equipment is malfunctioning, the Central Alarm System Supervisor will assign an Officer to take over the function of the malfunctioning equipment and make adjustments in the assignments of other Officers to fill in. Normally, the Officer responsible for the area in which the defective equipment is located will be tapped to take over its functions, but the CAS Supervisor may assign a different Officer if the area Officer is unavailable.⁴ Once the equipment is repaired, the Supervisor will eliminate the temporary post and return Officers to their normal stations.

Supervisors may also change a Security Officer's post based on the demands of another post to ensure adequate coverage of all secure areas. If a suspicious event occurs requiring a Security Officer to leave his assigned post to monitor a particular location of the facility, the Supervisor then fills the vacant post with another available Officer. When a Security Officer needs a break for lunch, the restroom, or due to illness, a Supervisor may relieve that Officer from their post and reassign another Officer to cover that secured area. However, if a Security Officer needs to leave their post to go home, the Supervisor must refer the Officer to a Team Leader or Shift Commander for further evaluation. Selection of Officers to serve as fill-ins is typically based on availability.

The number of vehicles attempting to enter the Main Gate is sometimes too great to permit Officers assigned that post to conduct the necessary inspections, and the Main Gate Supervisor may delay post rotations to permit Officers to catch up. The Main Gate Supervisor can also reassign Officers to assist with inspections or to serve as escorts if the normal inspectors and escorts are otherwise occupied. The Project Manager designates three employees who may be reassigned to the Main Gate, and the Main Gate Supervisor must select one of these employees if he is in need of assistance. Again, most Officers are qualified to perform all of the tasks associated with their position, and selection to fill-in as a Main Gate substitute is usually based on availability.

⁴ Nuclear Regulation Commission guidelines require that if a security-sensing device is malfunctioning, a Security Officer must be posted at the location.

Officers assigned to the Response Team have designated areas to which they report in case of a security “event”. The Response Team Supervisor may alter these assignments depending on the nature of the event or move Officers while an event is in progress if he regards a change of assignment as necessary. The Response Team Supervisor may also designate somebody to perform the hourly fire watch check if the Officer assigned the function is busy with other tasks.

Most of the work performed by the Security Officers is routine and requires little direction. Supervisors monitor Officers to make certain they are correctly performing any required searches and may order a more extensive search if they feel one is necessary. The Response Team Supervisor conducts a “walk-down” at the start of each shift with all employees assigned to the Response Team. The “walk down” consists of describing a hypothetical security emergency and asking employees how they would react. The Employer provides the hypothetical along with the appropriate response although a Supervisor may vary the scenario if he chooses. Officers who fail to give correct answers are counseled and may be disqualified from serving in a Response Team position until they have been retrained.

Supervisors will also periodically take their teams through “Table Top drills” in which they are asked to respond to a hypothetical situation and graded on their response. Again, an employee who fails to perform adequately might be obliged to undergo retraining. Supervisors are required to complete “scorecards” evaluating Officers on various aspects of their performance and to test Officers on their performance of particular skills. The “scorecards” are considered in evaluating Officers for promotion, and the skill tests might lead to retraining in the event an Officer performs poorly. In theory, an Officer who is unable to perform a particular function even after retraining might be terminated, but there is no evidence this has ever occurred.

D. DISCIPLINE

The Employer’s current progressive disciplinary policy became effective April 6, 2001. The policy contemplates a four step disciplinary procedure beginning with an oral counseling and culminating in termination. The witnesses who testified agreed that the Supervisors’ authority in this area, at least when they are functioning as Supervisors and not filling in as Team Leaders, is limited to giving oral counselings. According to the Employer’s policy, oral counselings may, but do not have to be, memorialized in writing. The policy indicates that a written disciplinary counseling should be prepared if an employee commits an infraction which was already the subject of an oral counseling. Disciplinary suspensions may be imposed for repeated infractions. When an employee commits an infraction after having received an oral and written counseling and a suspension for the same behavior, the policy requires termination. There is an exception if more than a year has elapsed since the last disciplinary incident.

The record contains three documents memorializing oral counselings for poor attendance administered by Supervisors. One of the counselings was given out by Supervisor William Montgomery who testified that Operations Supervisor Glen Fahring instructed him to issue the

counseling. The record does not indicate the circumstances under which the two remaining counselings were issued.

Supervisor Howard Neuhaus reported giving two additional oral counselings for absenteeism which were apparently never reduced to writing. Both counselings were given in an office in the presence of a Team Leader. There is no evidence of Supervisors giving counselings for infractions other than poor attendance or of any additional counselings for attendance violations.

The only evidence of Supervisors becoming involved in discipline beyond the level of an oral counseling involved Neuhaus. Neuhaus testified that on two occasions, he recommended a higher form of discipline to a Team Leader. In both instances, the Team Leader disagreed with Neuhaus' recommendation and, after investigating the incident, did not invoke more serious discipline.

E. PROMOTION AND REWARD

Each Supervisor completes annual performance appraisals for approximately three Security Officers on his team. The appraisals are forwarded to the Team Leader and Project Manager for review, and the Supervisor will then meet with the Security Officer to go over each section of the appraisal and discuss where improvement is needed. According to Supervisor Montgomery, his Team Leader generally does not make changes to his performance appraisals unless she believes that they are incomplete. Performance appraisals appear to have no impact on employee working conditions with the possible exception of promotions.

In addition to completing evaluations, Supervisors may issue letters of commendation to Security Officers. Such letters are placed in employee personnel files and also have some impact on promotions. The record contains reference to only one Commendation Letter which was issued by Supervisor William Montgomery.

According to Project Manager Shannon, a Security Officer seeking a promotion to a Supervisor position undergoes a "record book review," a written test and an oral board. The record book review is worth 35 points and consists of a review of all of the Officer's performance appraisals. If the Security Officer has a letter of commendation, he receives an added point value for his record book. Shannon claimed that any Officer with a negative performance appraisal in his file would be automatically disqualified from further consideration for promotion to a Supervisor position. However, he could not recall if such a disqualification had ever occurred and conceded that, at most, it may have happened on one occasion.

After the record book review, an Officer must complete a twenty-question written test worth 100 points. The written test consists of multiple-choice and fill in the blank answers. Supervisors have graded the tests based on correct answers formulated by the Employer.

Following the written test, the Officer goes through an "oral board," an oral exam consisting of approximately twenty questions which must be answered in front of a three person "board". The board usually consists of Project Manager Shannon, the Officer's Team Leader

and the Training Supervisor, but Supervisors have been asked to participate if the Team Leader is unavailable. The members of the oral board grade the Officer's responses on a 200-point scale, considering both the Officer's answers and his demeanor during the exam. The scores are then averaged and added to the candidate's scores on the record book and written test. The candidate with the highest total score receives the job.

The only Supervisors to participate on an oral promotion board are former Supervisors Miranda and Schaffer. Project Manager Shannon indicated that Miranda and Schaffer participated in the interviews of eight of the forty Officers considered for promotion since the Employer began operations at Oyster Creek in 2000.

Oral board members will sometimes ask non-participating Supervisors their opinions of candidates for promotion and take the Supervisors' opinions into consideration in deciding whether to grant an upgrade. Supervisor Seth Knauer testified that his opinion was solicited on two occasions. Knauer recommended promotion in both cases, and the Officers involved were later promoted.

F. ADJUSTMENT OF GRIEVANCES

The Employer maintains an "open door" policy which encourages Officers to contact their immediate Supervisor to address work-related issues.⁵ If the issue cannot be resolved by the Supervisor, it is presented to the Team Leader or Project Manager. Other than the open door policy, the Employer has no other process to resolve employee grievances.

Supervisors and Team Leaders log any concerns raised by Security Officers on a form called the Open Door Policy Contact Log. The Employer introduced a copy of the Log for the first few months of 2003. Most of complaints noted on the Log consist of requests for either equipment repairs, replacement equipment or copies of Employer policies. There is no evidence of Supervisors resolving more serious employee complaints about working conditions.

Security Officers have the opportunity to review the timesheets that report their hours worked. If an Officer disagrees with the number of hours that are being reported, he or she will inform a Supervisor. The Supervisor then checks the time sheet against the schedule to determine whether there is a discrepancy. Supervisor Knauer, while serving as Shift Commander, has actually adjusted the hours on an Officer's time sheet approximately six times. However, a Supervisor not serving as Shift Commander can not adjust an Officer's hours and must seek out upper management if he uncovers what he believes to be an error.

G. SUBSTITUTION FOR TEAM LEADERS

The Team Leaders have overall responsibility for operations on their shifts, and the parties have agreed that they are supervisors within the meaning of the Act. If a Team Leader is absent due to illness, training, or vacation, his post will normally be filled by another Team Leader. If no other Team Leader is available, then the job goes to a Supervisor. One or two of

⁵ This policy was instituted in November 2002.

the Supervisors on each shift are designated as Lead Supervisors, and it is the Lead Supervisors who are usually asked to serve as Team Leaders. But, all newly promoted Supervisors are trained to serve as Team Leaders, and any Supervisor who has completed the training may be asked to serve in the Team Leader role. A Supervisor acting as a Team Leader for an entire shift is paid at the Supervisor rate of pay, but receives an extra hour of pay as compensation for the extra responsibility – i.e., 13 hours of pay for 12 hours of work.

In addition to filling in when a Team Leader is absent for an entire shift, the Supervisor designated as the Assistant Shift Commander will step into the Team Leader role when the Team Leader leaves the Employer's office during the course of a shift. The Team Leader normally leaves the office at least twice during each shift to conduct post inspections and may be called out for other reasons. However, it is not clear how much of a Team Leader's time on an average shift is spent outside the office, and the Team Leader is reachable by cell phone even when not present in the office area. While filling in, an Assistant Shift Commander theoretically possesses all of the powers usually exercised by the Team Leader, and the record indicates that Assistant Shift Commanders when acting as Team Leaders will authorize Security Officers to go home due to illness or modify post rotations to accommodate changed circumstances. There is no evidence that Assistant Shift Commanders substituting as Team Leaders for a part of a shift have exercised some of the other powers of the Team Leader position such as the power to discipline or suspend Security Officers.

Supervisor William Montgomery testified that approximately ten times per week he is required to temporarily serve in the Team Leader post for a portion of a shift while the Team Leader is out of the office. Beyond this, the record does not indicate the frequency with which particular supervisors are either assigned the Assistant Shift Commander position or obliged to fill in for Team Leaders during temporary absences.

The Employer introduced into evidence schedules showing the number of occasions between October 2002 and June 2003 on which Supervisors were assigned to fill a Team Leader slot for an entire shift. The schedules indicate that just ten Supervisors were asked to act as Team Leaders. This means that over half of the Employer's 21 Supervisors did not serve as Team Leaders. Further, some of the Supervisors served as Team Leaders on just a handful of occasions. Supervisors Neuhaus and Carrino, for instance, appear to have each been assigned as Team Leader on just one occasion during the eight months covered by the schedules, while Supervisors Lee, Knauer and Montgomery acted as Team Leaders on three, four and five occasions, respectively. At least one of the Supervisors who served with greater frequency in the Team Leader role, Supervisor Miranda, is no longer employed by the Employer, while another, Supervisor Kobran, seems to have been promoted into a permanent Team Leader position.

H. CONCLUSIONS AS TO SUPERVISORY STATUS

As I noted in the Introduction, I find that the Employer's Supervisors do not exercise any of the powers listed in Section 2(11) and conclude that they are not supervisors within the meaning of the Act. Starting with the claim that Supervisors have the power to discipline other employees, it is settled that an individual is a supervisor if he can issue or effectively recommend verbal warnings which are part of an employer's progressive disciplinary policy. *Atlas*

Minerals, 256 NLRB 91, 100, fn. 14 (1981). However, there is insufficient evidence that the Employer's Supervisors independently issue such warnings.

The record contains evidence of just five occasions on which Supervisors issued verbal warnings to employees. Supervisor Montgomery testified that he was specifically instructed by a superior to issue one of the warnings. Team Leaders were present when Supervisor Neuhaus issued two more of the warnings, and it is not clear what role the Leaders played in the decision to impose the discipline. And, there is no evidence indicating the circumstances which led to the two remaining warnings, and Project Manager Shannon conceded that Team Leaders may also have been involved in deciding that they should be given. In short, there is no evidence of any Supervisor independently deciding to give an employee a verbal warning, and, absent such evidence, I find supervisory status has not been demonstrated. Further, the only Supervisor to testify that he recommended discipline beyond verbal warning, Supervisor Neuhaus, indicated his recommendations were ignored. The Employer has not established that the Supervisors have the power to impose or effectively recommend discipline.

Nor has the Employer demonstrated that Supervisors can reward or promote other employees. The Supervisors do complete Security Officer performance appraisals, but there is no evidence the appraisals have any direct impact on Security Officer working conditions with the possible exception of promotions. It is settled that completion of employee appraisals or evaluations does not establish supervisory status absent evidence that the appraisals directly determine personnel actions affecting the employees. *Nymed, Inc.*, 320 NLRB 806, 813 (1996).

Performance appraisals are considered in evaluating candidates for promotion, but they are merely one of the factors looked at by the Employer and do not directly determine who will receive an upgrade. Similarly, letters of commendation issued by a Supervisor may add points to the score of a candidate for a Supervisor position, but they are also just one of the factors considered. Further, only one Supervisor, Montgomery, indicated that he had issued a Letter of Commendation, and this single, isolated Commendation would not be sufficient to confer supervisory status even if a more direct connection with promotions had been demonstrated.

As for the participation of a small number of Supervisors in the oral tests administered to candidates for promotion, the record makes clear that the scores given by the Supervisors are averaged with the scores awarded by other testers and that a candidates' score on the oral test is just one of factors which determines whether he/she will be promoted. Similarly, Supervisory opinions regarding candidates for promotion which are solicited by higher ranking officials may be considered but are not outcome determinative. Merely having input into management decisions which are actually made by others does not confer supervisory status. *SDI Operating Partners*, 321 NLRB 111 (1996). And, it is apparent that the Supervisors have, at most, input into decisions regarding promotions. I find that the Employer has failed to demonstrate that the Supervisors reward or promote other employees.

There is also insufficient evidence to demonstrate that Supervisors have the authority to hire other workers. Project Manager Shannon's testimony that he believed Supervisors Miranda and Shaffer may have participated on boards evaluating candidates for hire is not sufficiently definite to establish that they were actually involved and there is no testimony regarding the role

they might have played. This leaves evidence of just one Supervisor, Supervisor Neuhaus, who definitely participated on a hiring board, and such sporadic participation in the hiring processes is not indicative of supervisory status. *Latas de Alumnio Reynolds*, 276 NLRB 1313 (1985). Similarly, the Supervisors' recommendations in 2000 regarding the employment of temporary Security Officers in permanent positions appears to have been an isolated incident and there is no evidence that Supervisors have been consulted on subsequent occasions when temporary workers were considered for permanent jobs. Such an isolated event is insufficient to predicate a supervisory finding. *Commercial Fleet Wash*, 190 NLRB 326 (1971); *Highland Telephone Cooperative*, 192 NLRB 1057 (1971).

With respect to the adjustment of grievances, the record shows that Supervisors have done no more than respond to requests for equipment and copies of Company policies and forward complaints about the need for equipment repairs. The Board has indicated that the limited authority to resolve such minor disputes is not enough to confer supervisory status. *Ken Crest Services*, 335 NLRB 777, 778-79 (2001).

The role of the Supervisors in assigning and directing the work of Security Officers also falls short of demonstrating supervisory status. The work performed by the Security Officers is routine, dictated largely by established policies and procedures of the Employer's client and requires little direction. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 714 (2001), citing *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), where the Board concluded that "although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations." Supervisors can relieve Officers for breaks and refer them to the Team Leader if they claim a need to depart due to illness, but the Board has found that the exercise of such authority is routine and does not confer supervisory status. *Ranch Market*, 321 NLRB 811, 812 (1996); *Injected Rubber Products Corp.*, 258 NLRB 687, 691 (1981). The Supervisors' reassignment of Officers to cover posts is also routine since Officers all have the same qualifications and the reassignments are either predetermined by the Officers' original assignments or based on availability. *Parkview Manor*, 321 NLRB 477, 478 (1996); *Inland Steel Co.*, 308 NLRB 868, 881-82 (1992); *Esco Corporation*, 298 NLRB 837, 838 (1990). Finally, the fact that Supervisors are sometimes asked to prepare work schedules for Officers does not confer supervisory status absent evidence, lacking here, that independent judgment must be exercised in determining which shift and post Officers are to be assigned. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). In sum, I find the Employer has failed to establish that the Supervisors, when functioning as Supervisors, exercise any of the supervisory powers set out in Section 2(11).

This leaves the Employer's claim that the Supervisors should be viewed as supervisors within the meaning of the Act because of their substitution for Team Leaders. Employees who spend a regular and substantial part of their working time substituting for supervisors are customarily excluded from the bargaining unit. *Aladdin Hotel*, 270 NLRB 838, 840 (1984). This does not mean, however, that employees exercising only sporadic or irregular supervisor functions meet the statutory definition of supervisor. *Latas de Alumnio Reynolds, supra*; *Meijer Supermarkets*, 142 NLRB 513 (1963); *Indiana Refrigerator Lines*, 157 NLRB 539 (1966).

The Supervisors in this case substitute for Team Leaders in two situations. When assigned as the Assistant Shift Commander, a Supervisor will fill in when the Team Leader is out of the office and will perform at least some of the Team Leader's normal functions. But, although a Supervisor is assigned to serve as Assistant Shift Commander on each shift, the Employer did not establish how frequently particular supervisors serve in this role or show how much of a normal shift the Assistant Shift Commander spends substituting for the Team Leader. Absent such evidence, I find the Employer has failed to show that Supervisors acting as Assistant Shift Commanders spend a regular and substantial percentage of their time as supervisors.

Some Supervisors also fill in when Team Leaders are absent for an entire shift. But, the work schedules introduced into evidence by the Employer demonstrate that many Supervisors have not served in this role and that others have replaced Team Leaders on an infrequent basis. As to those Supervisors who often act as Team Leaders, the record does not indicate the reason for the substitution. If the Supervisors were merely filling in during annual vacations or on a one-time basis for a Team Leader forced to miss work due to injury, then a finding of supervisory status based on the substitution would not be appropriate. *Latos de Alumino Reynolds, supra*. A more regular pattern of substitution on days off, on the other hand, might warrant a finding of supervisory status. *Inland Steel Co., supra* at 882-83. I find that the Employer has not demonstrated that the Supervisors fill in for Team Leaders on a regular and substantial basis and that its Supervisors are supervisors within the meaning of the Act.⁶ *Carlisle Engineered Products, Inc.*, 330 NLRB 1359, 1360-1361 (2000).

III. THE SUPERVISORS AS CONFIDENTIAL EMPLOYEES

The Employer also argues, for the first time in its brief, that even if the Supervisors are found not to exercise supervisory powers under Section 2(11), they still should be denied representation rights because they are confidential employees. A confidential employee is someone who assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations, or who regularly substitutes for employees having such duties. *B.F. Goodrich Company*, 115 NLRB 722 (1956). To establish confidential status, a party must show that an employee: (1) shares a confidential relationship with managers who formulate, determine and effectuate management policies in the field of labor relations; and (2) assists and acts in a confidential capacity to such managers. *NLRB v. Hendricks Country Rural Electric Membership Corp.*, 454 U.S. 170, 189 (1981).

The Employer argues that its Supervisors should be regarded as confidential employees because they have access to employee personnel files, work closely with Project Manager Shannon, attend management meetings at which Employer policies are discussed, assist in the hiring and promotion process and have participated in issuing discipline to Security Officers. It

⁶ The Employer contends that its Supervisors perform functions identical to the sergeants found to be supervisors by the Board in *Burns International Services, Inc.*, 278 NLRB 565, 570-71 (1986). The sergeants in *Burns* often imposed disciplinary action on other employees without review by upper management. The record does not establish that the Supervisors in this case exercise similar authority. *Burns* is, therefore, distinguishable from this case.

is settled that mere access to personnel files does not confer confidential status. *John Sexton & Co.*, 224 NLRB 1341(1976). And, the participation of the Supervisors in hiring, promotion and discipline would, at best, establish that they assist in the effectuation of labor relations policy, but does not demonstrate any role in its formulation.

Similarly, the Supervisors' attendance at management meetings would establish confidential status only if labor relations policy was determined at the meetings. But, the only evidence regarding the meetings was provided by Project Manager Shannon who testified that Employer "policies and procedures" were discussed but did not specify that labor relations issues were considered. In fact, to the extent Shannon provided any details about the questions considered at the meetings, he indicated that "security specific things" were discussed, plainly suggesting that operational as opposed to labor issues were the focus.

As for the Supervisors' relationship with Shannon, it would not confer confidential status absent evidence that Shannon determined labor relations policy and that the Supervisors acted in a confidential capacity when dealing with Shannon. The record is devoid of any evidence establishing that the Supervisors relationship with Shannon is confidential. And, the only proof of Shannon's duties was provided by Shannon who simply stated that his function is to administer the Employer's operations at Oyster Creek including the "whole realm of human resources, hiring, firing, labor relations..." It is possible this might be enough to show that Shannon administers Company labor relations policies, but it falls well short of demonstrating that he formulates such policies. See, *E.C. Waste, Inc.*, 339 NLRB No. 39 at fn. 2 (2003). I find the Company has failed to show that its Supervisors are confidential employees.

IV. SUPERVISOR HOWARD NEUHAUS

Neuhaus has been employed as a Supervisor at the Oyster Creek facility since July 2000. He is currently classified as a Power Shift Supervisor. In the Power Shift post, Neuhaus works an eight-hour day shift during which he assists with administrative work and fills in for other Supervisors on post to keep overtime to a minimum. The Employer first created the Power Shift Supervisory post at the end of 2002, after Neuhaus was diagnosed with a medical condition that prevented him from performing the full duties of a Supervisor. Neuhaus resumed his regular Supervisor position at the beginning of 2003, but since May 2003, has served in the Power Shift Supervisor post again due to a medical condition. Shannon expects that Neuhaus will return to a regular Supervisor position soon, although he intends to maintain the Power Shift Supervisor post and may fill the post with another Supervisor.

As Power Shift Supervisor Neuhaus regularly fills in for other Supervisors and has a sufficient community of interest to be included in the same unit. Further, Neuhaus is only temporarily serving in the Power Shift position and will return to his regular Supervisor position in the near future. Employees who have a reasonable expectancy of returning to their duties in the unit are considered part of the unit for the purposes of voting in a representation election. *Mrs. Baird's Bakeries*, 323 NLRB 607 (1997) (employee transferred from driver position to non-unit position pending a court hearing on a driving while intoxicated charge was eligible to vote); *Red Arrow Freight Lines, Inc.*, 278 NLRB 965 (1986) (where an employee on disability

leave was eligible to vote). Thus, even if the Power Shift Supervisor position was not included in the unit, I would find Neuhaus eligible to vote.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part-time Supervisors, including Lead Supervisors, and Power Shift Supervisors, employed by the Employer at the Oyster Creek Nuclear Generating Station in Forked River, New Jersey; excluding all other employees, Team Leaders, Project Managers, Operations Supervisors, Training Supervisors, Security Officers, clerical employees, guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by International Brotherhood of Electrical Workers, AFL-CIO, Local Union 400. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they

were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within **7** days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **October 24, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597-7658. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 working days prior to 12:01

a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on **October 31, 2003**.

Signed: October 17, 2003

at Philadelphia, PA

/s/

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

177-8560-1500

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